FILED

03-1172 FEB 16 2004

No.

OFFICE OF THE CLERK

In The

Supreme Court of the United States

STEPHEN J. LINSENMEYER;
JAN M. LINSENMEYER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Sixth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In a Chapter 11 Bankruptcy case, can income taxes incurred by the sale of property be avoided by a bankruptcy estate, and the taxes passed on to insolvent bankruptcy debtors, when the Bankruptcy Court orders that certain assets will be distributed pursuant to a confirmed plan of arrangement, but subjects the assets to the 11 USC § 392 automatic stay after confirmation of the plan, all to the benefit of the nongovernmental creditors and to the detriment of the debtors and the United States?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Stephen J. and Jan M. Linsenmeyer, individuals;

United States of America.

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BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Sixth Circuit entered its Judgment on November 18, 2003. Appendix A-1. Petitioners Stephen J. Linsenmeyer and Jan M. Linsenmeyer ("the Linsenmeyers"), seek review of that Judgment.

The present petition is timely filed under 28 USC § 2101(c) and under Rule 13.1 of this Court.

This Court has jurisdiction under 28 USC § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

STATUTORY PROVISIONS

11 USC § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities

Investor Protection Act of 1970 [*15 USCS § 78eee*(a)(3)], operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [*15 USCS § 78eee*(a)(3)], does not operate as a stay –

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section –

(A) of the commencement or continuation of an action or proceeding for –

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on

the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

(5) [Deleted]

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, or secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or

settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of –

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the

stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 [*20 USCS § 1085*(j)] or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section –

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of –

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title [*11 USCS §§ 701* et seq.] concerning an individual or a case under chapter 9, 11, 12, or 13 of this title [*11 USCS §§ 901* et seq., 1101 et seq., 1201 et seq., or 1301 et seq.], the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if –

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless,

not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) –

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the

consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section –

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 USC § 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired

under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan –

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not –

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if –

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title [*11 USCS §§ 701* et seq.].

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter [*11 USCS §§ 1101* et seq.].

26 USC § 6012. Persons required to make returns of income.

(a) General rule. Returns with respect to income taxes under subtitle A shall be made by the following:

(1)(A) Every individual having for the taxable year gross income which equals or exceeds the exemption amount, except that a return shall not be required of an individual –

(i) who is not married (determined by applying section 7703), is not a surviving spouse (as defined in section 2(a)), is not a head of a household (as defined in section 2(b)), and for the taxable year has gross income of less than the sum of the exemption amount plus the basic standard deduction applicable to such an individual,

(ii) who is a head of a household (as so defined) and for the taxable year has gross income of less than the sum of the exemption amount plus the basic standard deduction applicable to such an individual,

(iii) who is a surviving spouse (as so defined) and for the taxable year has gross income of less than the sum of the exemption amount plus the basic standard deduction applicable to such an individual, or

(iv) who is entitled to make a joint return and whose gross income, when combined with the gross income of his spouse, is, for the taxable year, less than the sum of twice the exemption amount plus the basic standard deduction applicable to a joint return, but only if such individual and his spouse, at the close of the taxable year, had the same household as their home.

Clause (iv) shall not apply if for the taxable year such spouse makes a separate return or any other taxpayer is entitled to an exemption for such spouse under section 151(c).

(B) The amount specified in clause (i), (ii), or (iii) of subparagraph (A) shall be increased by the amount of 1 additional standard deduction (within the meaning of section 63(c)(3)) in the case of an individual entitled to such deduction by reason of section 63(f)(1)(A) (relating to individuals age 65 or more), and the amount specified in clause (iv) of subparagraph (A) shall be increased by the amount of the additional standard deduction for each additional standard deduction to which the individual or his spouse is entitled by reason of section 63(f)(1).

(C) The exception under subparagraph (A) shall not apply to any individual –

(i) who is described in section 63(c)(5) and who has –

(I) income (other than earned income) in excess of the sum of the amount in effect under section 63(c)(5)(A) plus the additional standard deduction (if any) to which the individual is entitled, or

(II) total gross income in excess of the standard deduction, or

(ii) for whom the standard deduction is zero under section 63(c)(6).

(D) For purposes of this subsection –

(i) The terms "standard deduction", "basic standard deduction" and "additional standard deduction" have the respective meanings given such terms by section 63(c).

(ii) The term "exemption amount" has the meaning given such term by section 151(d). In the case of an individual described in section 151(d)(2), the exemption amount shall be zero.

(2) Every corporation subject to taxation under subtitle A;

(3) Every estate the gross income of which for the taxable year is $ 600 or more;

(4) Every trust having for the taxable year any taxable income, or having gross income of $ 600 or over, regardless of the amount of taxable income;

(5) Every estate or trust of which any beneficiary is a nonresident alien;

(6) Every political organization (within the meaning of section 527(e)(1)), and every fund treated under section 527(g) as if it constituted a political organization, which has political organization taxable income (within the meaning of section 527(c)(1)) for the taxable year; and

(7) Every homeowners association (within the meaning of section 528(c)(1)) which has homeowners association taxable income (within the meaning of section 528(d)) for the taxable year[;]

(8) Every individual who receives payments during the calendar year in which the taxable year begins under section 3507 (relating to advance payment of earned income credit)[; and]

(9) Every estate of an individual under chapter 7 or 11 of title 11 of the United States Code (relating to bankruptcy) the gross income of which for the taxable year is not less than the sum of the exemption amount plus the basic standard deduction under section 63(c)(2)(D).

except that subject to such conditions, limitations, and exceptions and under such regulations as may be prescribed by the Secretary, nonresident alien individuals subject to the tax imposed by section 871 and foreign corporations subject to the tax imposed by section 881 may be exempted from the requirement of making returns under this section.

(b) Returns made by fiduciaries and receivers.

(1) Returns of decedents. If an individual is deceased, the return of such individual required under subsection (a) shall be made by his executor, administrator, or other person charged with the property of such decedent.

(2) Persons under a disability. If an individual is unable to make a return required under subsection (a), the return of such individual shall be made by a duly authorized agent, his committee, guardian, fiduciary or other person charged with the care of the person or property of such individual. The preceding sentence shall not apply in the case of a receiver appointed by authority of law in possession of only a part of the property of an individual.

(3) Receivers, trustees and assignees for corporations. In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

(4) Returns of estates and trusts. Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

(5) Joint fiduciaries. Under such regulations as the Secretary may prescribe, a return made by one of two or more joint fiduciaries shall be sufficient compliance with the requirements of this section. A return made pursuant to this paragraph shall contain a statement that the fiduciary has sufficient knowledge of the affairs of the person for whom the return is made to enable him to make the return, and that the return is, to the best of his knowledge and belief, true and correct.

(6) IRA share of partnership income. In the case of a trust which is exempt from taxation under section 408(e), for purposes of this section, the trust's distributive share of items of gross income and gain of any partnership to which subchapter C or D of chapter 63 applies shall be treated as equal to the trust's distributive share of the taxable income of such partnership.

(c) Certain income earned abroad or from sale of residence. For purposes of this section, gross income shall be computed without regard to the exclusion provided for in section 121 (relating to gain from sale of principal residence) and without regard to the exclusion provided for in section 911 (relating to citizens or residents of the United States living abroad).

(d) Tax-exempt interest required to be shown on return. Every person required to file a return under this section for the taxable year shall include on such return the amount of interest received or accrued during the taxable year which is exempt from the tax imposed by chapter 1.

(e) Consolidated returns. For provisions relating to consolidated returns by affiliated corporations, see chapter 6.

26 USC § 6151. Time and place for paying tax shown on returns.

(a) General rule. Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined

without regard to any extension of time for filing the return).

(b) Exceptions.

(1) Income tax not computed by taxpayer. If the taxpayer elects under section 6014 not to show the tax on the return, the amount determined by the Secretary as payable shall be paid within 30 days after the mailing by the Secretary to the taxpayer of a notice stating such amount and making demand therefor.

(2) Use of Government depositaries. For authority of the Secretary to require payments to Government depositaries, see section 6302(c).

(c) Date fixed for payment of tax. In any case in which a tax is required to be paid on or before a certain date, or within a certain period, any reference in this title to the date fixed for payment of such tax shall be deemed a reference to the last day fixed for such payment (determined without regard to any extension of time for paying the tax).

STATEMENT OF THE CASE

The Linsenmeyers filed a Chapter 11 bankruptcy petition in January 1989. A Plan of Reorganization was approved on August 28, 1989.

Incorporated into the Plan of Reorganization was a settlement agreement that the Linsenmeyers had entered into with Monroe Bank and Trust. The settlement agreement had been approved by the Bankruptcy Court on March 24, 1989, and made a part of the Chapter 11 Plan of

Reorganization, approved on August 28, 1989. Pursuant to the Settlement Agreement, Monroe Bank and Trust gave a new loan to the Linsenmeyers for approximately $1.8 million, that was to be used to fund the Linsenmeyers' Chapter 11 reorganization plan. The new loan was secured with various collateral, including shares of Monroe Bank and Trust stock owned by the Linsenmeyers. Under the terms of the Settlement Agreement, the new loan came due in October 1989. If the Linsenmeyers failed to repay the new loan before the due date, the Linsenmeyers were to consent to lift the automatic stay on the property and Monroe Bank and Trust was then free to sell the stock. The Linsenmeyers missed the October 1989 deadline, and were granted a two-month extension of the deadline by the Bankruptcy Court. The Linsenmeyers then missed the new December 1989 deadline.

After the December 1989 deadline passed, the Bankruptcy Court ordered that the automatic stay under 11 USC § 362 be modified to permit Monroe Bank and Trust to sell the Linsenmeyers' stock in order to satisfy the March 1989 loan. The stock was subsequently sold by Monroe Bank and Trust in January 1990. The Bank sold the stock for $1,760,000 and applied that amount against the March 1989 loan. The Linsenmeyers did not receive any of the stock sale proceeds.

The Bankruptcy Court then converted the Linsenmeyers' Chapter 11 proceedings to Chapter 7 in July 1990. The Chapter 7 Bankruptcy Trustee filed a tax return on behalf of the bankruptcy estate. The return, however, was for the period July 1990 to December 1990 and did not include the gain from the January 1990 sale of the stock. As a result, the Linsenmeyers were considered to be personally liable for the income tax incurred on the sale of

the stock. The income tax resulting from the stock sale was approximately $300,000.

When the Linsenmeyers' Chapter 11 was converted to Chapter 7 in July 1990, the Linsenmeyers' remaining assets were turned over to the Chapter 7 Bankruptcy Trustee. Those assets were sold by the Trustee. The proceeds, however, were not paid to the U.S. to satisfy the income tax liability resulting from the January 1990 sale of the stock. The proceeds of the liquidation of the Linsenmeyers' remaining assets were paid over to other creditors, tax free. Had the assets been sold and paid over to the United States, it would have received most, if not all of the taxes resulting from the stock sale.

In May 2000, the Linsenmeyers filed a motion with the Bankruptcy Court to reopen the case and appoint a trustee to file an amended tax return for the estate for the full year of 1990 to reflect the January 1990 stock sale as attributable to the bankruptcy estate, not the Linsenmeyers. The United States Trustee opposed the motion on the ground that the gain should be attributed to the Linsenmeyers. The United States' Internal Revenue Service joined with the U.S. Trustee. The Bankruptcy Court reopened the case and appointed a trustee but denied the Linsenmeyers' request to have the trustee file an amended tax return for the estate. Appendix A-23.

The Linsenmeyers filed a Motion for Reconsideration which was denied by the Bankruptcy Court. Appendix A-15. On appeal to the District Court, the Bankruptcy Court was affirmed. Appendix A-6.

The Sixth Circuit Court of Appeals affirmed the U.S. District Court and Bankruptcy Court and held that under 11 USC § 1141(b), upon the confirmation of the plan of arrangement, the Monroe Bank and Trust Stock reverted to

the Linsenmeyers personally and was no longer in the bankruptcy estate. Appendix A-1. Even though the settlement agreement provided for the continued imposition of the automatic stay over the stock, and the plan itself specifically "incorporated by reference" the settlement agreement into the plan, as well as the Bankruptcy Court in later decisions in the Linsenmeyers' bankruptcy clearly considering that the stock was subject to the automatic stay imposed by 11 USC § 362, the Sixth Circuit held that the stock had been distributed to the Linsenmeyers by the confirmed plan of arrangement. The Sixth Circuit based its decision on express language in the plan that provided that the property in the estate was to revert to the Linsenmeyers upon confirmation of the plan. The Sixth Circuit held that the settlement agreement that had been specifically incorporated and made a part of the plan was "extrinsic evidence" and "of no relevance."

ARGUMENT

A. The Court Of Appeals Decision Fails To Follow An Opinion Of The Supreme Court.

The decision of the Sixth Circuit Court of Appeals provides that even though upon confirmation of a Chapter 11 plan the property of a bankruptcy estate is not distributed to a debtor free of the Bankruptcy Court's control, all of the assets in the bankruptcy estate will be considered to have reverted to the debtor for tax purposes. This decision is in conflict with the plain meaning of the Bankruptcy statutes and the holding of the Supreme Court in *Holywell Corp. v. Smith*, 503 U.S. 47 (1992).

The Court of Appeals Decision fails to follow the Bankruptcy statute. 11 USC § 362 states in part:

> § 362. Automatic stay
>
> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [*15 USCS § 78eee*(a)(3)], operates as a stay, applicable to all entities, of –
>
> . . .
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> . . .
>
> (c) Except as provided in subsections (d), (e), and (f) of this section –
>
> (1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

The automatic stay does not cover assets that are not part of the bankruptcy estate. 11 USC § 362(c)(1). The confirmation of the Chapter 11 plan terminates the automatic stay with respect to assets that are transferred out of the bankruptcy estate. 11 USC § 362(c)(2). *Placid Ref. Co. v. Terrebonne Fuel & Lube,* 108 F.3d 609, 613 (5th Cir. 1997); *McKinney v. Watterman S.S. Corp.*, 925 F.2d 1, fn 4 (1st Cir. 1991); *U.S. Dept. of the Air Force v. Carolina Parachute Corp.*, 907 F.2d 1469, 1474 (4th Cir. 1990)

Because the parties in the Linsenmeyers' bankruptcy agreed to leave the automatic stay in effect with respect to the stock, the stock had to have remained part of the estate by default. There is nothing unique about property remaining in a bankruptcy estate after confirmation. As the United States itself stated in its Supreme Court Reply Brief in *Holywell Corp. v. Smith, Supra.*:

> Indeed, the Bankruptcy Code explicitly provides that a fiduciary may continue to hold and administer property of the estate after a plan is confirmed. Under 11 USC 1123(b)(3), a plan may provide for "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose," of "any claim or interest belonging to the debtor or to the estate." The Bankruptcy Code thus plainly contemplates that the estate may continue to exist and be represented by a fiduciary after confirmation. See *Duvoisin v. East Tennessee Equity, Ltd. (In re Southern Industrial Banking Corp.)*, 59 B.R. 638, 642 (Bankr. E.D. Tenn. 1986); *In re T.S.P. Industries, Inc.*, 120 B.R. [107] at 109 n.2 [Bankr. N.D. Ill. 1990] (describing debtor's additional fiduciary responsibilities when "property of the estate remain[s] property of the estate after confirmation").

Using the argument of the United States in *Holywell* set forth above, when the stock in the instant case was sold the tax consequences should have flowed to the estate, not to the Linsenmeyers individually. The Sixth Circuit's decision (which ignored the statutory mandate that the automatic stay can only be placed on property if it is in the bankruptcy estate), resulted in the Linsenmeyers being personally taxed on the sale of bankruptcy estate property. The Linsenmeyers received all the burdens of

property ownership after confirmation of the plan, but with none of the rights and with no assets to satisfy their tax liabilities. By this ploy, the creditors managed to gain priority over the United States with respect to the Linsenmeyers' remaining assets.

The United States, in its *Holywell* Reply Brief filed with the Supreme Court, stated:

> The standard procedure for collection of post-petition taxes is for the trustee to file returns and pay the tax reported due, as *26 USC 6012* and 6151 require. Our system of taxation depends upon such self-assessment. *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944). Once the return is filed by the trustee, the Internal Revenue Service may request payment of any amount not paid with the return as an expense of administration. It may also select the return for audit and, if it finds a deficiency, may request payment of the deficiency on the same basis. The fact that the IRS has not yet formalized its claim against the trust for post-petition income in this case reflects only the failure of the trustee to file required returns, not a breakdown in internal procedures on the part of the IRS.

In the present case, the Linsenmeyers' creditors were paid ahead of income tax that should have been considered an administrative expense.

B. The Sixth Circuit Decision Conflicts With The Decision Of the Ninth Circuit.

The Ninth Circuit in *Hillis Motors, Inc., v. Hawaii Automobile Dealers' Association*, 997 F.2d 581 (9th Cir. 1993), found that the debtor whose Chapter 11 plan had been confirmed "[W]as not free to deal with its property and the world as it would have been if it had not been subject to the jurisdiction of the bankruptcy court." *Id.* at 589. As a result, the debtor's property was deemed to have remained in the estate despite the confirmation of the plan. The major factor contributing to the *Hillis* court's determination that the property remained in the estate after confirmation was that the plan did not return control of the debtor's business to the debtor's sole stockholder, nor did it transfer the assets to another entity. Instead, the trustee managed the business. The analysis turned on the fact that the debtor in *Hillis* was not free to do what it pleased with its assets. *Id.*

The Sixth Circuit in the instant case declined to put any importance on the fact that the Linsenmeyers did not have control over the stock after the confirmation of their plan. The stock was tied up as a result of the pre-confirmation settlement agreement with the Linsenmeyers' creditors. The settlement agreement was specifically made a part of the Chapter 11 plan. The Linsenmeyers had no control over the stock, nor did the creditors have any control until the automatic stay was lifted. The stock was treated as if it were still part of the bankruptcy estate, despite the confirmation of the Linsenmeyers' Chapter 11 plan.

It is true that the Chapter 11 plan did provide that all of the assets were to revert to the Linsenmeyers upon

confirmation. Also, 11 USC § 1141(b) does provide that "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."

In the instant case, however, the Linsenmeyers assert that the settlement agreement, which had been specifically made a part of their plan, met the "Except as otherwise provided in the plan" language of 11 USC § 1141(b). The settlement agreement had been "incorporated by reference" and made a part of the plan of arrangement by the language of the plan itself.

As a result, the same situation existed in the instant case as was presented to the Ninth Circuit in *Hillis*, and was before the Supreme Court in *Holywell*. A plan of arrangement had been confirmed, yet the debtors still did not have control over their assets. In both cases there was a post-confirmation estate to preserve. The Linsenmeyers submit that the Ninth Circuit's approach to the question now before the Supreme Court better serves the interests of the debtors in a bankruptcy proceeding when there is a post-confirmation estate and better serves the interest of the United States in collecting taxes.

C. The Proceeding Involves An Important Issue In That The Result Will Lead To Significant Hardship By Not Permitting Bankruptcy Debtors To Free Themselves Of Tax Liabilities After A Bankruptcy Proceeding And Will Result In A Tax Loophole.

A person should not exit from bankruptcy burdened with tax resulting from the sale of the property of the

bankrupt estate. The Bankruptcy Trustee has the obligation to file tax returns with regard to income incurred during the sale of estate property. *Holywell Corp. v. Smith*, 503 U.S. 47 (1992). The Trustee is obligated to make a return as the "fiduciary" of a "trust." 26 USC § 6012(b)(4). ("Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.")

One would think that the United States would adopt the position it took in *Holywell*, *i.e.*, the Trustee has the obligation to file tax returns and pay taxes incurred by the sale of assets of a bankrupt. If a Trustee is required to file a tax return reporting the sale of assets, the United States is practically guaranteed that it will receive the taxes that result from the sale. This is because the Trustee will have the proceeds from the sale available to pay taxes as administrative expenses.

In the instant case, however, the Trustee sold the assets of the Linsenmeyers (other than the stock), and distributed the proceeds not to the United States, but to ordinary creditors. The United States received nothing. This was the same original result produced by the lower courts in *Holywell*. In *Holywell*, the United States sought the same result as the Linsenmeyers seek in this Petition. That result should be that the Bankruptcy Trustee pays the tax that resulted from the sale of the estate's stock. In the instant case, not only are the Linsenmeyers personally burdened with the tax resulting from the sale of the stock, but the remaining assets were sold by the Bankruptcy Trustee and distributed to creditors other than the United States. Both the Linsenmeyers and the United States came up short.

The United States in its Brief filed in *Holywell Corp. v. Smith,* 503 U.S. 47 (1992), stated:

> The decision of the court of appeals [in *Holywell*] creates a tax loophole of troubling proportions. It would allow a liquidating trustee to be appointed in a case under Title 11, take title to the debtor's assets, invest or dispose of those assets in a manner that realizes taxable income, but neither report nor pay the taxes owed on that income. In reaching this remarkable result, the court ignored both the language and purpose of the statutory provisions enacted by Congress specifically to ensure that such a loophole would not exist.

While in *Holywell* the United States argued against the loophole, it now argues for the loophole. The Brief of the United States in *Holywell* does an excellent job of explaining the harmful effect such a loophole will have on the federal and state tax systems.

The Decision of the Sixth Circuit in the instant case opens the way for bankruptcy creditors to shift the tax burden from a bankruptcy estate, which may have assets, to a debtor who is likely to possess nothing, having just exited from bankruptcy. It is unknown why the United States is arguing against the position it took in *Holywell.* The position the United States is taking in this case is contrary to its best interests.

The creditors of a bankrupt should not be permitted to use the Bankruptcy Court to move assets out of the bankruptcy estate while keeping those assets subject to the protection and control of the Bankruptcy Court. The end result is that the assets are sold outside of the bankruptcy estate with the full amount of the proceeds (undiminished by taxes), flowing to creditors other than the federal and

state taxing authorities. Review of the Court of Appeals decision through a writ of certiorari will yield a result that is fair both to bankruptcy debtors and the federal and state taxing authorities.

Respectfully submitted,

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NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court. In the Sixth Circuit, if cited, a copy must be served on other parties and the Court.

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No. 02-1371

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: Stephen J. Linsenmeyer; Jan M. Linsenmeyer, Debtors,	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
STEPHEN J. LINSENMEYER; JAN M. LINSENMEYER; Plaintiffs-Appellants,	(Filed Nov. 18, 2003)
v.	
UNITED STATES OF AMERICA, Defendant-Appellee.	

Before: SILER, BATCHELDER, and COOK, Circuit Judges.

PER CURIAM. Debtors Stephen J. Linsenmeyer and Jan M. Linsenmeyer appeal the bankruptcy court's ruling that the taxable gain arising from a certain stock

sale was attributable to them and not their bankruptcy estate. We affirm.

BACKGROUND

The Linsenmeyers filed a Chapter 11 bankruptcy petition in January 1989. In February 1989, the Linsenmeyers as debtors-in-possession entered into a settlement agreement in an adversary proceeding with Monroe Bank & Trust ("MBT") and Ohio Citizens Bank. The bankruptcy court approved the settlement in March 1989. The settlement agreement provided, among other things, that (1) MBT would lend the Linsenmeyers approximately $1.8 million to be used to fund the Chapter 11 plan, (2) the Linsenmeyers' shares in MBT would serve as partial collateral for the loan, and (3) MBT could foreclose on the stock if the Linsenmeyers defaulted. The Linsenmeyers also agreed to "execute a consent order for automatic relief from stay for all collateral in the event payment is not received" on time.

Five months later, in August 1989, the bankruptcy court confirmed the Second Amended Plan of Reorganization (the "Plan"). The Plan incorporated the earlier order approving settlement of the adversary proceeding. Article VII of the Plan provided that "[a]ll property of the Debtors shall revert to the Debtors upon the effective date of this Plan, and their business shall thereafter be conducted by the Debtors, and not be Debtors-In-Possession." This language tracks the language of 11 U.S.C. § 1141(b), which provides that all estate property reverts to the debtors upon the effective date of the plan of reorganization. The Plan became effective on September 8, 1989.

The Linsenmeyers missed the due date for repaying the MBT loan and, in accordance with the settlement agreement, asked for and were granted a two-month extension. They missed that deadline as well, however, so the bank sold the stock in January 1990. The Linsenmeyers reported the income from that sale on their individual income tax returns for 1990. They have yet to pay the tax.

In May 2000 the Linsenmeyers moved the bankruptcy court to reopen the case and to appoint a trustee to file an amended tax return for the Chapter 11 estate for 1990. The bankruptcy court denied their motion and the district court affirmed.

STANDARD OF REVIEW

In a bankruptcy appeal, we "review the bankruptcy court's decision rather than the district court's review of the bankruptcy court's decision." *Barlow v. M.J. Waterman & Assocs., Inc. (In re M.J. Waterman & Assocs., Inc.),* 227 F.3d 604, 607 (6th Cir. 2000). The bankruptcy court's factual findings are reviewed for clear error and its conclusions of law are reviewed de novo. *In re Eagle-Picher Indus., Inc.,* 285 F.3d 522, 527 (6th Cir. 2002).

DISCUSSION

Filing a petition in bankruptcy creates a bankruptcy estate, which is deemed to possess "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The bankruptcy estate also includes "[a]ny interest in property that the estate acquires after the commencement of the case." 11 U.S.C. § 541(a)(7). Where the debtor is an individual who

files a petition under Chapter 7 or 11, the bankruptcy estate is a separate taxpayer. I.R.C. § 1398.

In a Chapter 11 case, upon confirmation of a plan of reorganization, the property of the estate vests in the debtor and the estate terminates – that is, unless the plan provides otherwise. 11 U.S.C. § 1141(b) ("Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."); *see also In re Chattanooga Wholesale Antiquities, Inc.*, 930 F.2d 458, 462 (6th Cir. 1991). The bankruptcy court retains jurisdiction to ensure that the plan is followed, however. *See In re Gordon Sel-Way, Inc.*, 270 F.3d 280, 288-89 (6th Cir. 2001).

In the instant appeal, the Plan became effective on September 8, 1989. As both parties agree, the Plan is to be construed as a contract, *Hillis Motors, Inc. v. Haw. Auto. Dealers' Ass'n*, 997 F.2d 581, 588 (9th Cir. 1993) ("A reorganization plan resembles a consent decree and therefore, should be construed basically as a contract."), and under Michigan contract law extrinsic evidence is relevant only if the terms of the contract are ambiguous. *Mich. Nat'l Bank v. Laskowski*, 580 N.W.2d 8, 10 (Mich. App. 1998) ("When two parties have entered in to a written contract and have expressed their intention that the writing constitute the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing."). Given the unmistakable language of Article VII ("All property of the Debtors shall revert to the Debtors upon the effective date of the Plan. . . .), and the equally unmistakable language of 11 U.S.C. § 1141(b) ("Except as otherwise provided in the plan or the order confirming the plan, the

confirmation of a plan vests all of the property of the estate in the debtor."), the Plan is unambiguous as a matter of law. We need look no further than the language of Article VII.

The Linsenmeyers' attempt to avoid the plain language of the Plan is predicated on their interpretation of certain provisions of the settlement agreement executed in February 1989, which settled the adversary proceeding. As explained above, however, such extrinsic evidence is of no relevance where, as here, the contractual language is plain.

Also, the Linsenmeyers argue that the bankruptcy court's entry of an "Order Granting Relief from Stay to Monroe Bank & Trust" in December 1989, after the Linsenmeyers had twice defaulted on their loan, demonstrates that the bankruptcy estate was still in existence at that point, and that the MBT stock was still part of the bankruptcy estate. This argument is meritless. The order granting relief from stay appears to have been agreed to by the parties to the Settlement Agreement, which preceded the Chapter 11 Plan and was incorporated into it. It is not clear from the record why the bankruptcy court entered the order; it is clear from this record, however, that the order was neither necessary to permit the bank to sell the shares nor effective to alter the express terms of the Plan.

Pursuant to the Plan and § 1141(b), the estate property reverted to the Linsenmeyers upon the effective date of the Plan. Because the stock was sold after the effective date of the Plan, the resulting tax liability is upon the Linsenmeyers.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE STEPHEN J. LINSENMEYER AND JAN M. LINSENMEYER, Debtors. /	Civil Action No. 01-CV-73810-DT HON. BERNARD A. FRIEDMAN Chapter 7 No. 89-00691-R HON. STEVEN W. RHODES

OPINION AND ORDER AFFIRMING BANKRUPTCY COURT'S ORDER

This is an appeal from an order of Bankruptcy Judge Steven W. Rhodes, denying the debtors' motion for reconsideration. The debtors' motion for reconsideration asked Judge Rhodes to change his earlier ruling denying their motion to appoint a trustee to file an amended tax return to indicate that the gain from a sale of the debtors' stock was property of the bankruptcy estate. The effect of this ruling is that the debtors themselves, and not the bankruptcy estate, are responsible for paying the federal tax on the gain. This appeal is brought by the debtors, Stephen and Jan Linsenmeyer; the appellee is the United States. Pursuant to E.D. Mich. LR 7.1(e)(2), the court shall decide this matter without oral argument.

This case began as a Chapter 11 bankruptcy matter in January 1989. Shortly thereafter, the Linsenmeyers commenced an adversary proceeding against the Monroe Bank and Trust and Ohio Citizens Bank ("MBT"). In March 1989, the Linsenmeyers and MBT entered into a settlement agreement, which the Bankruptcy Court

approved, that resolved the adversary proceeding. Under this agreement, MBT loaned the Linsenmeyers approximately $1.8 million, which was to be used to fund their Chapter 11 reorganization plan. The Bankruptcy Court approved the reorganization plan in August 1989. The $1.8 million loan was due in October 1989 and it was secured with various collateral, including shares of MBT stock owned by the Linsenmeyers. Under the settlement agreement, MBT could sell the stock if the Linsenmeyers failed to pay off the note on time. The Linsenmeyers missed the October 1989 deadline, but under the terms of the settlement agreement they requested and were granted a two-month extension by the Bankruptcy Court. When they also missed the December 1989 deadline, the bank sold the stock in January 1990.

In July 1990, the bankruptcy proceeding was converted from Chapter 11 to Chapter 7. The Chapter 7 trustee filed an income tax return on behalf of the bankruptcy estate for the period of July through December 1990. The gain from the stock was not reported on this return because the sale had occurred earlier in the year. Apparently, no one at that time complained to the Bankruptcy Court that the tax return filed by the trustee was incorrect. When the bankruptcy case was closed in January 1994, the trustee distributed the assets. The IRS was not paid any taxes on the gain from the sale of the stock.

In May 2000 the Linsenmeyers filed a motion to reopen the case to appoint a trustee to file an amended tax return for 1990. The Linsenmeyers sought the amended tax return to indicate that the gain was attributable to the estate, which may have enabled them to avoid any personal liability for the tax obligation. The United States opposed the motion on the grounds that the gain should be

attributed to the Linsenmeyers themselves. The Bankruptcy Court did appoint a trustee. However, after conducting a hearing as to whether the gain was the estate's property or the debtors' property, the Bankruptcy Court denied the debtors' request to have the trustee file an amended tax return for the estate. The Bankruptcy Court subsequently denied the Linsenmeyers' motion for reconsideration.

Analysis

The only issue in this appeal is whether the Bankruptcy Court erred in determining that no trustee should be appointed to file an amended tax return because the gain from the sale of stock is not property of the bankruptcy estate. In other words, is it the Linsenmeyers or their bankruptcy estate that is responsible for reporting this gain? Since the Bankruptcy Court made a legal ruling, not a factual finding, the parties agree that this court's review is *de novo*.

The starting point is 11 U.S.C. § 1141(b), which states: "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." The Sixth Circuit has noted that under § 1141(b), "upon confirmation of a Chapter 11 plan, unless there are contrary provisions, the property of the estate revests in the debtor along with normal ownership rights." *In re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458, 462 (6th Cir. 1991). In the present case, the debtors' Chapter 11 reorganization plan was confirmed by the Bankruptcy Court on August 28, 1989. Therefore, as of that date all of the property of the

estate vested in the Linsenmeyers – "except as otherwise provided in the plan or the order confirming the plan."

Nothing in the second amended plan of reorganization indicates that the shares of stock at issue did not "vest" in the Linsenmeyers. The following provisions of the plan are relevant, but none are contrary to the general rule from 11 U.S.C. § 1141(b) that all property of the estate vests in the debtors upon confirmation.

Paragraph II(C) of the plan states:

> The secured claim of Monroe Bank & Trust shall be paid according to the terms set forth with particularity in this Court's March 24, 1988 [sic: 1989] Order Approving Compromise of Adversary Proceeding, a copy of which is attached to this Plan and incorporated by reference as Exhibit "A."

Paragraph II(F) states:

> All unsecured claims against the Debtors . . . are as follows:
>
> (i) Contingent claims of Monroe Bank & Trust, Ameritrust Company, N.A., and Bruce D. and Julie M. Linsenmeyer-Dunbar: These claims are secured by collateral of the Debtors. The Debtors believe that in the event of a default in payment by them that the creditors would be fully paid by liquidating the collateral. . . .

And Article VII states:

> All property of the Debtors shall revert to the Debtors upon the effective date of this Plan, and their business shall thereafter be conducted by the Debtors, and not be Debtors-In-Possession.

Since there is nothing in the plan indicating that the property did not vest in the debtors, § 1141(b) directs that the property did vest in the debtors upon confirmation of the plan. This being the case, the Bankruptcy Court clearly was correct in concluding that the shares of stock belonged to the Linsenmeyers when they were sold in January 1990. The sale occurred after confirmation of the Chapter 11 plan but before the bankruptcy proceeding was converted from Chapter 11 to Chapter 7. Therefore, the Bankruptcy Court was also correct in denying the Linsenmeyers' motion to appoint a trustee to file an amended 1990 tax return for the estate, since the gain from the stock sale was not attributable to the estate, but rather to the Linsenmeyers themselves.

The Linsenmeyers make several arguments in an effort to avoid this conclusion, but none of them are persuasive. First, they note that the plan states "[a]ll property of the Debtors shall revert to the Debtors upon the effective date of this Plan," whereas the statute uses the term "vest." This slight difference in terminology is insignificant. The fact of the matter is that by statute the property vests in the debtor upon confirmation of the plan, "[e]xcept as *otherwise* provided in the plan or the order confirming the plan" (emphasis added). And the statutory term "vest" is not contradicted by the word "revert" used in the settlement agreement.

The Linsenmeyers next argue that the shares of stock must still have been property of the estate following confirmation of the plan because the bank had to move the Bankruptcy Court to lift the automatic stay before it could sell the stock. According to this argument, the stay would not have applied, and would not have had to be lifted, if

the stock had belonged to the Linsenmeyers instead of the bankruptcy estate.

While this argument has some superficial appeal, it is ultimately unpersuasive. To settle the adversary proceeding with the bank, the debtors agreed to pledge their stock as collateral to secure a loan. When the Chapter 11 plan was approved by the Bankruptcy Court, the title to the stock "vested" in (or, to use the term from the settlement agreement, "reverted" to) the debtors. The bank had to obtain relief from the automatic stay because it was seeking to sell property belonging to the debtors. As the Bankruptcy Court notes in its opinion, it has the authority to exercise control over property, including property that is not part of a debtor's bankruptcy estate, in order to ensure that a Chapter 11 plan is carried out or to ensure that the Bankruptcy Court's orders are effectuated. For example, 11 U.S.C. § 1142(b) states:

> The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

11 U.S.C. § 105(a) states:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. . . .

These statutory provisions give the Bankruptcy Court the authority to exercise some control over a debtor's property in order to ensure that the plan is carried out. This is a

particularly appropriate exercise of the Bankruptcy Court's authority in the present case, where the parties, with the Bankruptcy Court's approval, agreed that stock would be pledged as collateral and that the bank could liquidate the stock in the event the debtor defaulted. In sum, the continuation of the automatic stay is irrelevant to the question of whether the stock "vested" in the debtors. The simple fact of the matter is that 11 U.S.C. § 1141(b) tells us that the debtors' property vested in them upon confirmation of the plan, and this is not changed by the fact that the stock remained subject to the automatic stay after confirmation.

The Linsenmeyers also argue that the Bankruptcy Court cannot use its authority under § 105(a) to extend the automatic stay over non-estate property. According to the debtors, if the automatic stay applied to the stock, then the stock had to be property of the estate. They cite 11 U.S.C. § 362(c)(1), which states that "the stay of an act against property of the estate . . . continues until such property is no longer property of the estate." However, this statute does not say that a stay cannot apply to property that is not part of a bankruptcy estate. The parties cite a few cases, none of which are directly on point, for their respective positions as to whether the Bankruptcy Court has such authority. In the end, it does not matter in the present case whether or not the Bankruptcy Court may exercise control over non-estate property by maintaining an automatic stay over such property. Whether the stay was lawfully in effect or not, the statutory command of § 1141(b) cannot be avoided.

Finally, the Linsenmeyers argue that the stock must have been property of the estate because otherwise the case could not have been converted from a Chapter 11 to a

Chapter 7. The court must reject this argument. First, as the Bankruptcy Court notes at page 5 of its opinion, "11 U.S.C. § 1112, which governs conversion of a chapter 11 case to chapter 7, does not explicitly or implicitly require the existence of assets for a conversion." Moreover, the conversion of the case in July 1990 has no bearing [sic] the issue of whether the gain from the stock sale seven month [sic] earlier, in January 1990, was property of the estate or property of the debtors. The key to this case is § 1141(b), which specifically states that property of the bankruptcy estate vests in the debtor upon confirmation of a Chapter 11 plan, and in this case the debtors' reorganization plan was confirmed well prior to the stock sale. Further, even if a case cannot be converted from Chapter 11 to Chapter 7 unless there is property in the Chapter 11 estate to convert, the Linsenmeyers have not shown that there was no other property, besides the stock, in the estate at the time of the conversion.

Conclusion

For the reasons stated above, the court shall affirm the Bankruptcy Court's order denying the debtors' motion for reconsideration. The Bankruptcy Court did not err in denying the debtors' motion to appoint a trustee to file an amended tax return for their bankruptcy estate. The stock at issue vested in the debtors in August 1989, when the Bankruptcy Court confirmed their reorganization plan. The gain from the sale of that stock in January 1990 is properly attributable to the Linsenmeyers themselves. That gain is not property of the bankruptcy estate. Accordingly,

IT IS ORDERED that the Bankruptcy Court's order denying the debtors' motion for reconsideration is affirmed.

/s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: MAR 06, 2002
Detroit, Michigan

Copy Mailed This Date To: Joseph Falcone, Esq.
Karen A. Smith, Esq.
Douglas S. Ellmann, Esq.

United States Bankruptcy Court
Eastern District of Michigan
Southern Division

In re:
Stephen J. and Jan M. Linsenmeyer,
Debtors. /

Case No. 89-00691-R
Chapter 7

Opinion Regarding Motion for Reconsideration

I.

The Linsenmeyers seek reconsideration of the Court's May 14, 2001, denial of their motion for order approving filing of amended estate income tax return. For the reasons stated below, the motion is denied.

This case was initially filed under chapter 11 in January, 1989. On March 24, 1989, the debtors-in-possession entered into a settlement agreement with creditors Monroe Bank & Trust and Ohio Citizens Bank. The terms of the settlement agreement provided, in part, that stock in Monroe Bank & Trust (MBT), owned by the Linsenmeyers at the time they filed their petition, would be held by MBT as collateral for its debt. In the event of a default of the settlement agreement, the stock would be sold to satisfy the debt.

On August 28, 1989, the plan of reorganization was confirmed. The plan provided that MBT's secured claim would be paid in accordance with the terms set forth in the settlement agreement. The debtors defaulted on the terms of the plan and, on January, 3, 1990, the stock was sold pursuant to the March 24, 1989 settlement

agreement. In July of 1990, the case was converted to chapter 7. The case was closed on January 13, 1994.

On May 25, 2000, the Linsenmeyers filed a motion to reopen the case to appoint a trustee for the purpose of filing the estate's federal income tax return for the period of January 1990 through June 1990. The chapter 7 trustee had only filed a 1990 tax return for the period of July 1990, when the case was converted, through December 1990. The IRS claimed that the Linsenmeyers were personally responsible for the taxes that resulted from MBT's sale of the stock. The Linsenmeyers, however, believed that the sale of stock, which occurred in January 1990, should have been reported on the estate's tax return for 1990. The case was reopened on June 30, 2000.

On July 21, 2000, the Linsenmeyers filed a motion for the appointment of a trustee for the purpose of filing a tax return. On September 5, 2000, the Court entered an order appointing Basil Simon as trustee for the sole purpose of filing the estate's form 1041 for the period of January 1, 1990 through December 31, 1990.

On April 2, 2001, the Linsenmeyers filed a motion for order approving the filing of an amended estate income tax return which had been prepared by an accountant that they had retained. The trustee objected because he had not overseen the preparation of the return. The Court conducted a hearing on May 14, 2001. At the hearing, the Court concluded that the stock was not property of the estate at the time it was sold because upon confirmation of the plan, the property of the estate vested in the Linsenmeyers. Accordingly, the trustee was not required to report the stock sale on any estate

income tax return. The Court thus denied the Linsenmeyers' motion.

II.

In their motion for reconsideration, the Linsenmeyers contend that the stock remained property of the estate when it was sold on January 3, 1990, and therefore the sale should have been reported on the estate's federal income tax return. The Linsenmeyers acknowledge that upon confirmation, property of the estate normally revests in the debtors. However, the Linsenmeyers contend that if the estate property had legally revested in the debtors upon confirmation, there would have been no assets in the chapter 7 estate and it would have been impossible to convert the case from chapter 11 to chapter 7.

The Linsenmeyers contend that the confirmed plan specifically incorporated the March 24, 1989 Order Approving Compromise of Adversary Proceeding, which provided that the automatic stay was to remain in effect with regard to the stock. Further, the Linsenmeyers assert that on December 21, 1989, five months after the plan had been confirmed, the Court lifted the automatic stay with respect to the stock to permit MBT to foreclose its security interest in the stock. The Linsenmeyers contend that if the parties did not intend for the stock to remain property of the estate, the stay would not have remained in effect and lifting of the stay would not have been necessary.

The Linsenmeyers also contend that upon conversion, the trustee took control of all property that had been property of the chapter 11 estate. They argue that

if the property had revested in the debtors, this action would not have occurred. The Linsenmeyers assert that it was understood by all parties that the assets that had been part of the chapter 11 estate at the time of confirmation remained in the bankruptcy estate and were part of the converted chapter 7 estate.

III.

11 U.S.C. § 1141(b) provides, "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." *See also Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 462 (6th Cir. 1991) ("[U]pon confirmation of a Chapter 11 plan, unless there are contrary provisions, the property of the estate revests in the debtor 'along with normal ownership rights.'") (*quoting Kepler v. Independence Bank of Madison (In re Ford)*, 61 B.R. 913, 917 (Bankr. W.D. Wis. 1986)); *Harker v. Troutman (In re Troutman Enters., Inc.)*, 253 B.R. 1, 5 (B.A.P. 6th Cir. 2000).

In this case, the plan has no language which otherwise provides for the stock to remain property of the estate. To the contrary, the plan specifically provides that all property is to revert to the debtors upon the effective date of the plan and that their business would be conducted by the debtors, not the debtors-in-possession. (See Debtors' Ex. A, Second Amended Plan of Reorganization at 7.)

With respect to the claim of MBT, the plan provides, "The secured claim of MONROE BANK & TRUST shall be paid according to the terms set forth with particularity in

this Court's March 24, 1988 [sic] Order Approving Compromise of Adversary Proceeding." (See Plan at 3.) The Settlement Agreement, attached to the Order Approving Compromise of Adversary Proceeding, provided, in part, that MBT would lend the debtors approximately $1,840,000, secured in part by the debtors' stock in MBT. The obligation was due and owing October 1, 1989. The agreement further provided, "Debtors-in-possession further agree to execute a consent order for automatic relief from stay for all collateral in the event payment is not received at the term of the note." (See Order Approving Compromise of Adversary Proceeding, Ex. A to Plan.) On December 21, 1989, the automatic stay was lifted to permit MBT to foreclose its interest in the stock due to the debtors' default on the note.

The Linsenmeyers argue that because the automatic stay remained in effect with respect to the stock, the stock must have remained property of the estate. However, it is within a bankruptcy court's power to extend the stay to non-estate property. *See* 11 U.S.C. § 105(a). *See also Courtney v. Gainer Bank (In re Courtney)*, 79 B.R. 1004, 1013 (Bakr. N.D. Ind. 1987) (Section 105(a) authorizes the court to extend the automatic stay imposed by § 362 to provide the debtor with "breathing room" upon a determination that student loans were nondischargeable.); *River Hills Assocs., Ltd. v. River Hills Apartments Fund (In re River Hills Apartments Fund)*, 813 F.2d 702, 707 (5th Cir. 1987) (The court may enjoin actions against debtor's property upon expiration of the automatic stay.). Thus, the post-confirmation stay does not necessarily mean, or even suggest, that the property protected by it remained property of the estate,

especially when the plain language of the plan explicitly provided otherwise.

The Linsenmeyers also argue that the stock must have remained property of the estate because the case could not have been converted to chapter 7 if there were no assets that remained property of the estate. However, 11 U.S.C. § 1112, which governs conversion of a chapter 11 case to chapter 7, does not explicitly or implicitly require the existence of assets for a conversion. When there are no assets to administer, it could certainly be argued that conversion to chapter 7 is not in the best interest of creditors and the estate under § 1112(b). However, the argument was not made when this case was converted and the parties' assumption that there were assets to administer did not make it so.

The Linsenmeyers also cite two cases for the proposition that a case cannot be converted if there are no assets to administer. *Pioneer Liquidating Corp. v. Trustee (In re Consolidated Pioneer Mort. Entities)*, 248 B.R. 368 (B.A.P. 9th Cir. 2000) and *Chattanooga Wholesale Antiques*, 930 F.2d 458. However, these cases simply do not support that broad conclusion.

The Linsenmeyers also contend that the trustee's actions after conversion confirm that the property of the estate did not revest in the debtors. The Linsenmeyers assert that the trustee acted as if the plan had never been confirmed and sought to bring all property into the chapter 7 estate. However, that conduct is entirely consistent with the trustee's duties to maximize property of the estate. Experience suggests that it is common for a trustee to claim that all of the debtor's property becomes property of the chapter 7 estate upon conversion and thereby to

place the burden on parties in interest to object. Moreover, the actions of a chapter 7 trustee, who was not involved in the confirmation process, is no evidence of the intent of the parties at the time of confirmation.

Accordingly, the Court must conclude that, pursuant to § 1141(b), upon confirmation all property of the estate, including the stock sold by MBT, vested in the debtors. The Linsenmeyers' motion for reconsideration is therefore denied.

/s/ Steven W. Rhodes
Steven W. Rhodes
U.S. Bankruptcy Judge

Entered Sep 26, 2001

United States Bankruptcy Court
Eastern District of Michigan
Southern Division

In re:
Stephen J. and Jan M. Linsenmeyer,

Debtors /

Case No. 89-00691-R
Chapter 7

Order Denying Motion for Reconsideration

For the reasons set forth in this Court's opinion entered this date, the debtor's motion for reconsideration is denied.

IT IS SO ORDERED.

/s/ [Illegible]
Steven W. Rhodes
U.S. Bankruptcy Judge

Entered Sep. 26, 2001

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	HON. STEVEN RHODES
Stephen & Jan Linsenmeyer,	Case No. 89 00691 R
Debtors /	Chapter 7

ORDER DENYING MOTION TO
APPROVE AMENDED ESTATE TAX RETURN

This matter having come before the Court upon the Debtor's Motion to Approve Amended Tax Return, the Court being otherwise duly advised in the premises,

It is hereby ordered that the Motion is denied with prejudice.

It is further ordered that if the Debtor does not ask for reconsideration of the Motion by May 24, 2001, then this case is closed and the Successor Trustee, Douglas Ellmann, is discharged from further duties as trustee.

/s/ [Illegible]
U.S. Bankruptcy Judge

Dated: May 17, 2001

Supreme Court, U.S.
FILED
APR 20 2004
OFFICE OF THE CLERK

(2)

No. 03-1172

In the Supreme Court of the United States

STEPHEN J. LINSENMEYER AND JAN M. LINSENMEYER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether gain realized from the sale of petitioners' stock after the effective date of confirmation of their plan under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101-1174, was taxable to petitioners, or to their bankruptcy estate.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is available in 2003 WL 22735652. The opinion and order of the district court (Pet. App. 6-14) is reported at 280 B.R. 828. The opinion of the bankruptcy court (Pet. App. 15-23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 2003. The petition for a writ of certiorari was filed on February 16, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1989, petitioners filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101-1174. In February 1989, petitioners settled an adversary proceeding with Monroe Bank & Trust (MBT) and Ohio Citizens Bank. Pet. App. 2. The settlement agreement provided, *inter alia*, that MBT would lend petitioners, as debtors-in-possession, approximately $1.8 million that would be used to fund their Chapter 11 plan; that petitioners' shares in MBT would be partial collateral for the loan; and that MBT could foreclose on the stock if petitioners defaulted on the debt. Petitioners also agreed to "execute a consent order for automatic relief from stay for all collateral in the event payment is not received." *Ibid.*; see 11 U.S.C. 362 (providing for automatic stay).

In August 1989, the bankruptcy court confirmed petitioners' second amended plan of reorganization. The plan incorporated the order approving the compromise of the adversary proceeding. Article VII of the plan provided that "[a]ll property of the Debtors shall revert to the Debtors upon the effective date of this plan, and their business shall thereafter be conducted by the Debtors, and not [by] Debtors-In-Possession." Pet. App. 2. That provision comported with 11 U.S.C. 1141(b), which provides that, "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." The plan became effective on September 8, 1989. Pet. App. 2.

Petitioners subsequently defaulted on their payments to MBT and, in January 1990, MBT sold the stock consistent with the parties' settlement agreement. Petitioners reported the income from the sale on their individual income tax return for 1990, but did not pay the resulting tax. Pet. App. 3.

In July 1990, the bankruptcy proceeding was converted into a liquidation provision under Chapter 7, 11 U.S.C. 701-784. See 11 U.S.C. 1112(b). The Chapter 7 Trustee filed a federal income tax return on behalf of the bankruptcy estate for the period from the date of conversion in July through the end of 1990; the gain on the stock (which occurred before the conversion and the appointment of a trustee) was not reported on that return. The bankruptcy case was closed in January 1994. Pet. App. 7.

Six years later, petitioners filed a motion in the bankruptcy court to reopen the case and to appoint a trustee to file an amended tax return for the Chapter 11 estate for 1990 so that the estate could report the gain realized from the sale of the stock. Pet. App. 3, 7. The bankruptcy court reopened the case and appointed a trustee, but denied petitioners' request to order the trustee to file an amended tax return. *Id.* at 7-8, 15-23. The court concluded that "the stock was not property of the estate at the time it was sold because upon confirmation of the plan, the property of the estate vested in the [petitioners]." *Id.* at 16.

2. The district court affirmed. Pet. App. 6-13. The court explained that "the gain from the stock sale was not attributable to the estate, but rather to the [petitioners] themselves." *Id.* at 10.

3. The court of appeals affirmed in a per curiam unpublished opinion. Pet. App. 1-5. The court observed that, under 11 U.S.C. 1141(b), "[i]n a Chapter 11 case, upon confirmation of a plan of reorganization, the property of the estate vests in the debtor and the estate terminates—that is, unless the plan provides otherwise." Pet. App. 4. The court of appeals concluded that "the Plan is unambiguous as a matter of law" in providing that any property upon confirmation would revert to petitioners, because Article VII of the plan contained the "unmistakable language" that

estate property would revert to petitioners upon confirmation. *Ibid.* The court accordingly held that "[b]ecause the stock was sold after the effective date of the Plan, the resulting tax liability is upon the [petitioners]." *Id.* at 5.

ARGUMENT

The unpublished per curiam decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The filing of a petition in bankruptcy creates a bankruptcy estate that is deemed to include "all legal or equitable interests of the debtor in property as of the commencement of the case" (11 U.S.C. 541(a)(1)), as well as "[a]ny interest in property that the estate acquires after the commencement of the case" (11 U.S.C. 541(a)(7)). Upon confirmation of a plan of reorganization, however, the property of the estate vests in the debtor and the estate terminates, unless the plan or order approving the plan otherwise provides. 11 U.S.C. 1141(b); *Fairfield Communities, Inc.* v. *Daleske*, 142 F.3d 1093, 1095 (8th Cir. 1998); *Still* v. *Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 462 (6th Cir. 1991).

The court of appeals correctly found that petitioners, and not the bankruptcy estate, realized the gain from the sale of the MBT stock in January 1990 and therefore were liable for any resulting tax. Pet. App. 4-5. In this case, the bankruptcy court confirmed the plan of reorganization in August 1989, and the effective date of the plan was September 8, 1989. *Id.* at 2, 7, 15. The plan expressly stated in Article VII that "[a]ll property of the Debtors shall revert to the Debtors upon the effective date of this Plan." *Id.* at 2. Thus, under 11 U.S.C. 1141(b) and the plain terms of the plan, all property of the estate (including the stock at issue here) became petitioners' property upon the confirmed

plan's effective date in September 1989. Accordingly, the stock was property of petitioners at the time of the January 1990 sale, and the gain resulting from that sale was taxable income to petitioners.

Petitioners assert (Pet. 23) that the parties "agreed to leave the automatic stay in effect with respect to the stock" and that therefore "the stock had to have remained part of the estate by default." That is not correct. The bankruptcy court explained that it lifted the automatic stay post-confirmation in December 1989 to permit MBT to foreclose on petitioner's stock because the court had previously exercised its authority under 11 U.S.C. 105(a) to extend the stay to non-estate property. Pet. App. 19 ("Thus, the post-confirmation stay does not necessarily mean, or even suggest, that the property protected by it remained property of the estate."). In any event, the court of appeals correctly held that regardless of the reasons for issuance of an order lifting the stay, the bankruptcy court's order did not "alter the express terms of the Plan" providing that estate property reverted to petitioners. *Id.* at 5.

2. Petitioners argue (Pet. 21-26) that the court of appeals' decision conflicts with this Court's decision in *Holywell Corp.* v. *Smith*, 503 U.S. 47 (1992), and with the Ninth Circuit's decision in *Hillis Motors, Inc.* v. *Hawaii Automobile Dealers' Ass'n*, 997 F.2d 581 (1993). Those decisions are readily distinguishable, however, and they reflect the unremarkable proposition that a Chapter 11 plan may provide that property of the estate will revert to a party other than the debtor—a proposition expressly recognized by the court of appeals (Pet. App. 4-5) and the Code. 11 U.S.C. 1141(b) ("*Except as otherwise provided in the plan or the order confirming the plan*, the confirmation of a plan

vests all of the property of the estate in the debtor" (emphasis added).).*

Thus, in *Holywell*, a case involving the consolidated bankruptcy proceedings of an individual and related business entities, the Court held that the trustee of a trust holding property as assignee of the debtors' estates was required to report the gain from the sale of property that took place after confirmation of the plan. 503 U.S. at 52-56. The Court relied on the fact that the plan of reorganization had directed formation of a new trust upon confirmation and transfer of estate property to that trust. *Id.* at 50-51. By contrast, in this case, the plan specifically provided that upon confirmation all property would revert to petitioners. Pet. App. 2, 4.

In *Hillis*, the Ninth Circuit held that a debtor's corporate property remained in the bankruptcy estate after confirmation of the plan. 997 F.2d at 587-590. The court relied on the facts that the plan "unambiguously provide[d] for the continuation of the estate post-confirmation" (*id.* at 588); required that a percentage of the debtor's post-confirmation profits would be paid into the estate (*ibid.*); protected the estate from post-confirmation claims (*ibid.*); provided that any discharge of debts would occur in the future (*id.* at 589); and provided that the debtor's business would continue to be conducted under the bankruptcy court's supervision (*ibid.*). By contrast, the plan in this

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* Petitioners erroneously argue that the position of the United States is contrary to its general interest and its position in *Holywell* that the bankruptcy trustee should pay the tax rather than the debtor. Pet. 26-28. As discussed, unlike in *Holywell*, there was in this case no trustee at the time of the sale, and, under the plain and express terms of the plan, the property at issue belonged to the debtors at the time of the sale. To require petitioners to pay their tax liability creates no tax loophole; it simply imposes tax liability on the party whose property realized a taxable gain.

case provided that all property in the estate would revert to petitioners upon the effective date of the plan, and that the business would be run by petitioners. Pet. App. 2.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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APRIL 2004